No. 16035

In the United States Court of Appeals
for the Ninth Circuit

RALPH C. GRANQUIST, District Director of Internal Revenue for District of Oregon, APPELLANT

V.

MARGARET HACKLEMAN, APPELLEE

On Appeal From The Judgment Of The United States District Court For The District Of Oregon

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BRIEF FOR THE APPELLEE

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CITATIONS

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OPINION BELOW

The opinion of the District Court (R. 11-19), rendered on the Director's motion to dismiss, is reported at 147 F. Supp. 826. The District Court rendered no opinion in granting judgment.

JURISDICTION

This proceeding is based on a complaint and supporting affidavit (R. 3-6) filed in the District Court of Oregon on September 17, 1956, and an amended complaint (R. 8-10) filed on October 15, 1956; the

prayers of which were, in substance, that the District Court permanently enjoin the collection of amounts assessed against the appellee and the Estate of Abe Hackleman, deceased, of which she is executrix, as penalties for the late filing of income tax returns for the years 1953 and 1954, and declare such assessments null and void. Jurisdiction of the District Court apparently was sought to be invoked under Section 6213 of the Internal Revenue Code of 1954 (R. 3, 8) and 28 U.S.C., Section 1346 (referred to as "Section 1346, Title 26. U.S.C.A." (R.8)). The District Director of Internal Revenue, appellant herein, moved to dismiss the action for lack of jurisdiction on the ground that it was an action to enjoin the collection of internal revenue taxes, the maintenance of which is expressly prohibited by Section 7421 (a) of the Internal Revenue Code of 1954. (R. 11.) Under date of January 7, 1957, the District Court entered an opinion on the Director's motion to dismiss (R. 11-9), and on January 14, 1957, entered an order (R. 20-21) denying the motion to dismiss, restraining the collection of the penalties in issue until further order, and allowing the District Director 30 days within which to answer the complaint on the merits or submit to the prayer thereof. The District Director filed an answer to the complaint (R. 21-23) on April 12, 1957, again asserting lack of jurisdiction in the

court below to grant the relief prayed for. Motions for summary judgment were filed by the appellee on Octobed 18, 1957 (R. 24-25), and by the District Director on October 25, 1957 (R. 25-26). A judgment granting appellee the relief prayed for was entered by the District Court on January 13, 1958 (R. 26-28), and notice of appeal was filed by the District Director on February 27, 1958 (R. 28). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether additions to the tax, imposed under Section 291 (a) of the Internal Revenue Code of 1939 and 6651 (a) of the Internal Revenue Code of 1954 for the late filing of income tax returns, may be assessed and collected, without the prior issuance of ninety-day deficiency letters.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Codes of 1939 and 1954 and Treasury Regulations are printed in the Appendix, **infra.**

STATEMENT

Abe Hackleman died April 17, 1953. At the time of his death, he and his now-bereaved widow oper-

ated a 25,000-acre ranch upon which they raised some 1,500 head of cattle. Like most cattle ranchers, he was property poor and operated the ranch on crop loans. Like many cattle ranchers, his income tax records for 1951 through 1953 were in the hands of a revenue agent who was trying to convert Mr. Hackleman's accounting method from a cash to an inventory basis. This matter was finally concluded in the spring of 1956 with a deficiency for all years of some $400.00, but during the interlude of 1953 to 1956 the revenue agent made demand for and received the income tax records for 1953 and 1954. Ostensibly, this was necessary to give effect to a net operating loss carry-over which arose out of the audit. During the period of the audit it was the understanding of Mr. Hackleman's accountant and the attorneys for the Estate of Abe Hackleman that the tax attorney to whom the government auditor eventually returned the records was to file the return. Mrs. Hackleman and the tax attorney thought that her accountant was to prepare the returns when the federal audit was completed and that the accountant had secured the necessary extensions of time in which to file the income tax returns.

On June 6, 1958, which was shortly after the conclusion of the audit, the appellee filed with the appellant, District Director of Internal Revenue for the District of Oregon, income tax returns for her-

self for 1953 and 1954 and for the Estate of Abe Hackleman for 1953 and 1954, and paid the taxes and interest due thereon. (R. 8, 21.)

On or about June 6, 1956, there were assessed against Abe and Margaret Hackleman, because of a mathematical error in their return for that year, additional income taxes for the year 1953 in the sum of $180.34, together with interest in the sum of $28.76, and an addition to the tax for late filing of the return for that year in the sum of $346.16; and on or about the same date there were assessed against the Estate of Abe Hackleman, because of a mathematical error in the return for that year, additional income taxes for the year 1953 in the sum of $120.35, together with interest in the sum of $22.85, and an addition to the tax for late filing of the return in the sum of $476.31. These assessments for 1953 were not jeopardy assessments, and statutory notices of deficiency required by Section 272 (a) of the Internal Revenue Code of 1939 were not issued prior to the making of the assessments. (R. 8, 9, 22.)

Also, on or about June 6, 1956, there was assessed against Margaret Hackleman for the year 1954 an addition to the tax for that year in the sum of $578.49, as provided by Section 6651 of the Internal Revenue Code of 1954, for the late filing of her return for that year; and on or about the same date

there was assessed against the Estate of Abe Hackleman for the year 1954 an addition to the tax for that year in the sum of $663.90, as provided by Section 6651 of the 1954 Code, for the late filing of the return for that year. These assessments for 1954 were not jeopardy assessments, and statutory notices of deficiency required by Section 6212 of the 1954 Code were not issued prior to the making of the assessments. (R. 9, 10, 22.)

The Hackleman ranch is some sixty miles from nowhere in the remote regions of Crook County, Oregon. Mail is received once a week. On the 16th day of September, 1956, Mrs. Hackleman received a notice from the government which demanded that payment of the addition to the tax for the failure to file a timely return be made that day. At the time of receiving this demand for payment, Mrs. Hackleman did not have sufficient funds to meet the demand and was in the process of rounding up the cattle and harvesting the hay before the threatening winter snow set in. She managed to contact her attorney, Mr. Hickok, by phone and inform him of the demand and her inability to meet it. Mr. Hickok promptly took the matter up with Mr. Calvin Palmer, the local collection officer to whom the account had been assigned. Mr. Hickok explained the circumstance of the late filing and requested that the matter be referred for an administrative

determination of whether or not the failure to file timely income tax returns was due to reasonable cause and not due to wilful neglect. Mr. Palmer refused to do so and asserted that he was going to seize the ranch and bank account that day unless the tax was paid. Mr. Hickok explained that this would result in considerable hardship to appellee, due to loss of cattle and hay in the inclement weather. Mr. Palmer agreed to give Mr. Hickok 24 hours to drive the 162 miles to Portland and secure a directive from Mr. Sims, Chief of the Collection Division, referring the matter for an administrative determination.

Mr. Hickok went to Portland and explained the problem to Mr. Sims and requested the matter be referred for administrative determination. Mr. Sims admitted there was a question of whether or not the failure to file timely tax returns was due to reasonable grounds and not due to wilful neglect; but in spite of the loss Mrs. Hackleman would incur by a seizure of the ranch and in spite of the lack of funds to pay the additions to the tax which might not be owing, he refused to refer the matter for administrative review on the grounds that the payment of the addition to the tax and the suit for refund constitute sufficient administrative remedy, even though the pursuit of such a remedy is contrary to the purpose for which the Tax Court was

created and causes the taxpayer irreparable harm.

The present suit is to enjoin collection of the above amounts assessed as additions to the tax for late filing of returns without reasonable cause and due to wilful neglect, and to invalidate the assessments for these additions to the tax, on the ground that statutory deficiency notices were not issued prior to the making of the assessments. The District Court entered summary judgment granting the relief prayed for (R. 26-28), and the Director appealed (R. 28).

STATEMENT OF POINT TO BE URGED

The District Court was correct in concluding that the assessment of an addition to the tax under Section 291 (a) of the Internal Revenue Code of 1939 and under Section 6651 (a) of the Internal Revenue Code of 1954 is subject to the restrictions upon assessment of deficiencies in income tax provided by Section 272 (a) of the Internal Revenue Code of 1939 and Section 6213 of the Internal Revenue Code of 1954.

SUMMARY OF ARGUMENT

This is a suit to enjoin the collection of additions to the income tax of the appellee for the failure, without reasonable cause and due to wilful neglect, to file timely income tax returns.

The assessment of a penalty may be enjoined, but the assessment of an income tax may not be enjoined unless

(1) There exist extreme equitable grounds for such injunction, [1] or

(2) The statutory restrictions on the assessment of income, estate, and gift taxes have not been complied with. [2]

The suit herein was brought by the plaintiff below to enjoin the assessment of a tax [3] and not to enjoin the assessment of a penalty. Although there may exist sufficient equitable grounds to enjoin the assessment of tax in spite of the prohibitions contained in Section 7421 (a), the plaintiff did not rely upon these equitable grounds but sought a mandatory injunction under Section 6213 for the failure to comply with the restrictions on the assessment deficiencies in income tax.

It is submitted that if these additions to the tax were penalties, the prohibition on restraint from the assessment and collection of taxes would not be applicable.

The Board of Tax Appeals, now the Tax Court, was created as a forum where taxpayers may litigate

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[1] *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498

[2] *Davis* v. *Dudley*, 124 F. Supp. 426

[3] *Myers* v. *Commissioner*, 28 T.C. —,No. 2, filed April 19, 1957; *Washburn* v. *Commissioner*, 7 B.T.A. 483; I.R.C. 1954, Sec. 6659 (a) (2)

their liability for additional income, estate, or gift taxes before being required to pay. In the creation of the Board of Tax Appeals, Congress had the following to say:

> "The right of appeal after payment of a tax was an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the returning of the tax after payment. He is entitled to an appeal and to determination of his liability prior to its payment." Ways and Means Committee of the 68th Congress, First Session, House of Representatives Report No. 179, Pages 7 and 8.

When the appellee filed her income tax returns on June 6, 1956, and paid the amount of the income tax shown to be due thereon, she admitted only that it appeared to her that she owed that amount of income taxes shown on her return; she did not admit that she owed any other type of tax or an additional amount of income tax. When the commissioner assessed an additional amount of income tax as an addition to the tax for the failure, without reasonable cause and due to wilful neglect, to file timely income tax returns, he was assessing an additional

amount of income taxes, which additional amount of tax, when added to the amount of income tax shown upon the return, constituted the correct tax; and excess of this correct tax over the amount of tax shown on the return is a deficiency. The assessment and collection of a deficiency so determined may not be made until the taxpayer has had an opportunity to have the matter determined by the Tax Court.

It is admitted that the conflict between the **Erie Forge** case [4] (wherein the government was otherwise barred by the statute of limitations) and the **Washburn** case (**supra**) created confusion under the 1939 Code prior to the clear Congressional pronouncement in the 1954 Code. [5] It is submitted that the commissioner tried to dissuade Congress from making such additions to the tax subject to the procedure for the assessment and collection of a deficiency but was unsuccessful as was inferred in the committee reports: [6]

> "Section 6659 also makes clear that the procedures for the assessment of deficiencies in income, estate, and gift taxes (including ninety-day letters and appeal to the Tax Court) also apply to additions to those taxes."

It was always clear under the 1939 Code that

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[4] *United States* v. *Erie Forge Co.*, 191 F. 2d 627, certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970

[5] I.R.C. 1954, Sec. 6659 (a) (2)

[6] H Rep. No. 1337, 83rd Cong. 2d Sess., p. A420 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4568)

where the commissioner assessed a deficiency in tax irrespective of the existence of an addition to the tax for the failure to file a timely return and also assessed an addition to the tax, the entire deficiency so determined was subject to the procedure for assessment of the deficiency. As was inferred by the committee reports, it was not clear that a deficiency in income, estate, and gift taxes arising only from the assessment of an addition to the tax for the failure to file a timely return was subject to procedure for the assessment of a deficiency. As the committee reports state in the above quotation, the 1954 Code clarified this ambiguity.

Furthermore, since the advent of the 1954 Code, the Tax Court, [7] the Court of Appeals for the Fifth Circuit, [8] and four United States District Courts [9] (being all the courts that have considered this matter) have all uniformly held that these additions to the tax are subject to the procedure for the assessment and collection of deficiencies.

The rationale behind these decisions has not only

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[7] *Newsom* v. *Commissioner,* 22 T. C. 225
Myers v. *Commissioner* 28 T.C. —, No. 2, filed April 9, 1957
Marbut v. *Commissioner* 28 T.C. —, No. 74, filed June 24, 1957

[8] *Newsom* v. *Commissioner,* 22 T.C. 225, affirmed CA-5 219 F. 2d 444

[9] *Davis* v. *Dudley,* 124 F. Supp. 426 (West Dist. Pa.) ; *McAllister* v. *Dudley,* 148 F. Supp. 548 (West Dist. Pa.) ; *Hackleman* v. *Granquist,* 147 F. Supp. 826 (Dist. Oreg.) ; *Muse* v. *Enochs,* 58-2 USTC 9819, decided 8/26/58 (Miss.)

been a literal construction of Section 6659 (b), but also the reasoning that inherent to the success of our system of taxation by self-assessment is the requirement that the taxpayer be afforded an opportunity of judicial review before paying any additional amounts. Thus our citizens, rich and poor alike, are protected from the arbitrary and capricious administration of our tax laws. Taxation without due process of law is as tyrannical as taxation without representation, which oppression led our forefathers to found this country.

ARGUMENT

Additions To Income, Estate, Or Gift Taxes Imposed Under Sections 291 (a) Of The Internal Revenue Code of 1939 And 6651 (a) Of The Internal Revenue Code Of 1954 For The Late Filing Of An Income, Estate, Or Gift Tax Return Without Reasonable Cause For Such Neglect And Due To Wilful Neglect Are Subject To The Procedure For The Assessment Of Deficiencies In Income, Estate, And Gift Taxes (Including Ninety-Day Letters And Appeal To The Tax Court.)

This is a suit to enjoin the collection of additions to the income tax of the appellee for the failure, without reasonable cause and due to wilful neglect, to file timely income tax return.

The assessment of a penalty may be enjoined, but the assessment of an income tax may not be

enjoined unless:

(1) There exist extreme equitable grounds for such injunction, [10] or

(2) The statutory restrictions on the assessment of income, estate, and gift taxes have not been complied with. [11]

The suit herein was brought by the plaintiff below to enjoin the assessment of a tax and not to enjoin the assessment of a penalty. Although there may exist sufficient equitable grounds to enjoin the assessment of tax in spite of the prohibitions contained in Section 7421 (a), the plaintiff did not rely upon these equitable grounds but sought a mandatory injunction under Section 6213 for the failure to comply with the restrictions on the assessment of a deficiency in income tax.

An addition to income, estate, and gift taxes under Section 6651 for the failure, without reasonable cause and due to wilful neglect, to file a timely income, estate, or gift tax return is specifically made part of the correct tax by Section 6659 (b) which states:

"Section 6659 **Applicable Rules.** —(a) **Additions treated as tax.**—Except as otherwise provided in this title—

(1) The additions to the tax, additional

[10] *Miller* v. *Standard Nut Margarine Co.,* 284 U.S. 498

[11] *Davis* v. *Dudley,* 124 F. Supp. 426

amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

"(2) Any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

"(b) **Additions to tax for failure to file return or pay tax.**—Any addition under Section 6651 or Section 6653 to a tax imposed by another subtitle of this title shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax (including the provisions of Subchapter B of Chapter 63, relating to deficiency procedures for income, estate, and gift taxes)."

The Court should note that this section is divided into two parts, Paragraph (a) which makes **all additions** to the tax part of the tax to which the addition applies, and Paragraph (b) which makes the addition to the tax for the failure to file a timely income, estate, or gift tax return subject to the restrictions on assessments, including a ninety-day letter. It is only in the case of income, estate, and gift taxes that the manner of assessment and collection of additional taxes require the issuance of a ninety-day letter. [12]

Although it is the opinion of the Court below

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[12] *Muse* v. *Enochs*, 58-2 USTC 9819, decided 8/26/58 (Miss.)

that an addition to income tax for the failure, without reasonable cause and due to wilful neglect, to file a timely return is a deficiency within the meaning of Section 6211, such a determination is not essential to the validity of the Court's decision for the reason that Section 6659 (b) specifically makes the assessment of such additions in the case of income, estate, and gift taxes subject to the issuance of a ninety-day letter and the taxpayer's right to appeal to the Tax Court, rather than pay an additional tax he does not owe with money he does not have and then sue for refund in the United States District Court or Court of Claims.

The conclusion that additions to income, estate, and gift taxes are a deficiency is predicated upon two sections of the Internal Revenue Code. Section 6659 (a) (2) provides that

> "Any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the addition to the tax . . . . "

Section 6211 (a) in general defines a deficiency in income tax ". . . the amount by which the **'tax imposed'** " exceeds the amount reported by the taxpayer. This section when read in conjunction with Section 6659 (a) (2) defines the "tax imposed" as the tax imposed under Section 3 plus the additions to

the tax, imposed under Section 6651. [13] The excess of this correct amount of "tax imposed" over the tax reported by the taxpayer on his return is a deficiency, [14] and is subject to the restrictions on the assessment and collection of a deficiency including a ninety-day letter and the opportunity to appeal to the Tax Court.

Although the appellant has provided the Court with an imposing list of citations there are only eight cases relevant to the disposal of this matter, [15] four of which cases the appellant has not cited. [16]

The first case on this point was the **Washburn** case, 7 B.T.A. 483, where the Board of Tax Appeals held that an addition to the tax for the failure, without reasonable cause and due to wilful neglect, to file timely tax returns was to be assessed as a deficiency in tax. The Board said —

"The penalty for delinquency is assessed,

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[13] *Myers* v. *Commissioner,* 28 T.C. —, No. 2 filed April 9, 1957.
Marbut v. *Commissioner,* 28 T.C. —, No. 74, filed June 24, 1957

[14] *Myers* v. *Commissioner,* 28 T.C. —, No. 2, filed April 9, 1957
Marbut v. Commissioner, 28 T.C. —, No. 74, filed June 24, 1957. Both of these cases dealt with additions to the tax for the failure to file timely estimate tax return, and arose under Section 294 (d) of the 1939 Code. The Court's reasoning would be equally applicable to Section 291 as both sections are in Chapter 1 of the 1939 Code. Both cases are applicable to the 1954 Code wherein Section 291 and Section 294 (d) were combined without substantive change in Section 6651 which is the section herein involved.

collected, and paid in the same manner as, and is a part of, the tax; and therefore, when asserted, is assessed as a deficiency in tax."

The next case to decide this question was **United States** v. **Erie Forge Co.**, 191 F. 2d 627, which dealt with some hard facts and made bad law. In that case the taxpayer had failed to file Excess Profit tax reports for the period 1935 to 1940. The returns for the entire period were filed in 1941. On August 30, 1941, the commissioner assessed an addition to the tax for the failure to file timely returns. In 1943

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(15) *Washburn* v. *Commissioner,* 7 B.T.A. 483; *United States* v. *Erie Forge Co.,* 191 F. 2d 627, certiorari, denied, 343 U.S. 930, rehearing denied, 343, U.S. 970; *Newsom* v. *Commissioner,* 22 T.C. 225 affirmed, per curiam, 219 F. 2d 444.
Davis v. *Dudley,* 124 F. Supp. 426; *Myers* v. *Commissioner,* 28 T.C. —, No. 2, filed April 9, 1957; *Marbut* v. *Commissioner,* 28 T.C. —, No. 74, filed June 24, 1957; *McAllister* v. *Dudley,* 148 F. Supp. 548 (West Dist. Pa.); *Muse* v. *Enochs,* 58-2 USTC 9819, decided 8/26/ (Miss.)

The appellant also cited *Standard Oil Co.* v. *McMahon,* 244 F. 2d 11, which case is not applicable to the problem as it dealt with interest which is specifically made not subject to deficiency procedures by Section 6601 (f) (1). Section 6659 is not applicable to interest as Section 6659 applies only to Chapter 68; and the interest provision, Section 6601, is in Chapter 67. The Court is asked to compare the language of Section 6601 (f) (1) where Congress did *not* want the deficiency procedure to be applicable to what was basically a mathematical addition to the tax, and Section 6651 (b) where Congress did want the deficiency procedure to be applicable to an addition to the tax involving human discretion.

(16) *Myers* v. *Commissioner,* 28 T.C. —, No. 2, filed April 9, 1957; *Marbut* v. *Commissioner,* 28 T.C. — No. 74, filed June 24, 1957; *McAllister* v. *Dudley,* 148 F. Supp. 548 (West Dist. Pa.); *Muse* v. *Enochs,* 58-2 USTC 9819, decided 8//2658 (Miss.).

the commissioner gave a statutory notice of deficiency in the amount of $69,613.60 and added an addition to the tax for the failure to file a timely return in the amount of $17,245.22. No mention was made of the original additional assessment of 1941 in the amount of $68,517.63. Six months after the testimony was closed the commissioner sought to amend his pleadings to include the 1941 assessment. The Tax Court refused and the commissioner appealed to the Court of Appeals for the Third Circuit which sustained the Tax Court. In 1947 the commissioner again attempted the collection of the 1941 additions to the tax without a statutory notice of deficiency. The issuance of a statutory notice of deficiency was then barred by the statute of limitations.

The Court of Appeals concluded that this addition to the taxes was not subject to the deficiency procedure. The Court held that the language, "collected in the same manner as the tax," meant the tax shown on the return.

The Court argued—

> "However, where the penalty is based upon an amount which the taxpayer here admitted to be due, the Code prescribes the simpler method of collection first outlined."

It is submitted that Court erred in so holding in that the language, "same manner as the tax," does not refer to the tax shown on the return but refers

to the type of tax. [17] When the taxpayer filed a tax return and paid the tax shown to be due thereon it did not also admit that it owed an additional tax for the failure, without reasonable cause and due to wilful neglect, to file a timely return. To the contrary, the remission of the tax shown to be due on the return without the addition to the tax for the failure to file a timely return was an express denial that such failure was without reasonable cause and was due to wilful neglect.

The next case on this point was **E. C. Newsom,** 22 T.C. 225 (CA-5) 219 F. (2d) 444, which dealt with an addition to the tax under Section 294 (d) (2) of the 1939 Code for substantial underestimate of tax. In that case the commissioner had issued a statutory notice of deficiency for the sole purpose of assessing an addition to the tax for the substantial underestimate of tax. These additions to the tax the Tax Court held to be a deficiency and cited its former decision in the **Washburn** case. The affirming opinion of the Court of Appeals is quite brief and should be noted:

> "Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.
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> "PER CURIAM: The decision is affirmed on the opinion of the Tax Court, 22 T.C. No. 31 (CCH Dec. 20, 315), followed in **Davis** v.

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[17] *McAllister* v. *Dudley,* 148 F. Supp. 548 (West Dist. Pa.).

> **Dudley**, Dist. Ct. W. D. Pa., 124 Fed. Supp. 426, 429 (54-2 USTC 9590), by District Judge MARSH, one of the judges who had joined in deciding **United States** v. **Erie Forge Co.,** 3rd Cir., 191 Fed. (2d) 627 (51-2 USTC 9461), thought by the petitioner to be in conflict with the decision of the Tax Court. Affirmed."

In **Davis** v. **Dudley**, 124 F. Supp. 426, the commissioner had assessed the same penalty (Section 294 (d)) as was involved in the **Newsom** case but this time did not issue a statutory notice of deficency as he did in the **Newsom** case. Judge Marsh, who wrote the opinion and who was one of the judges participating in the **Erie Forge Co.** decision, held that such additions to the tax for the failure, without reasonable cause and due to wilful neglect, to file an estimate income tax return were deficiencies and subject to deficiency procedures.

Where the additions are to the same tax for the same reason; namely, the failure, without reasonable cause and due to wilful neglect, to file timely returns, is it conceivable that Congress intended that the taxpayer should have no administrative remedies where that addition is to the tax shown on the final tax return but should have administrative remedies where the addition is to the same tax but is shown on the estimated tax return?

It is interesting to note that the appellant in his brief (p. 26) states that Judge Marsh, who partici-

pated in the **Erie Forge Co.** opinion did not, in deciding the **Davis** case understand the language of Section 291 when it was carried over into the 1954 Code in Section 6659. After the clairfying language of the 1954 Code the judge who participated in the opinion in the **Erie Forge Co.** case was prompted to write—

> "In this connection it is interesting to note that in the Internal Revenue Code of 1954, in two sections (6651 and 6653) where the imposition of penalties likewise depends upon the exercise of judgment, collection thereof is by way of deficiency procedure and not in the manner of collecting taxes: see Section 6659."

The next court to determine this question, other than the court below in the instant case, was the United States District Court for the District of Pennsylvania in the case of **McAllister** v. **Dudley,** 148 Fed. Supp. 546, decided December 27, 1956, 57-1 USTC 9302. The suit involved an injunction brought to restrain the assessment of penalties for the failure to pay over witholding taxes. There the Court noted—

> "Section 2707 (a) of the Internal Revenue Code of 1939 and Section 6671 of the Internal Revenue Code of 1954 are substantially similar in that each provides that the penalty shall be assessed and collected in the same manner as taxes. From that we conclude that the penalty imposed for the wilful failure to pay employment taxes shall be assessed and collected in

> the same manner as employment taxes would be assessed and collected . . . .
>
> "The assessment here involved not being an assessment of a deficiency in respect of any income, estate, or gift tax, the suit to enjoin the collections thereof falls within the prohibitions contained in Section 7421 (a) of the Internal Revenue Code of 1954 and the actions must be dismissed."

The next case to consider this question was **Myers v. Commissioner,** 28 T.C. —, No. 2 filed April 9, 1957. In that case the commissioner had for the years 1949 and 1950 assessed additions to the tax for the failure to file timely estimates of income tax and for the substantial underestimate of estimated income tax. The commissioner had also found overassessments for each year. For the year 1949 the additions to the tax exceeded the overassessment and there was a net deficiency. For the year 1950 the overassessments exceeded the additions to the tax and there was a net overassessment. The Court, in holding it had jurisdiction as to 1949 because there was a deficiency and did not have jurisdiction as to 1950, said—

> "The real question for each year is whether the additions to the tax under Section 294 (d) are to be considered a part of the tax for the purpose of Section 271 (a), which defines a deficiency, for present purposes, as the amount by which the tax imposed by Chapter 1 exceeds the amount shown as the tax by the taxpayers upon their return. Here no rebate is involved,

and the amount shown as an overassessment for each year is the difference between the tax imposed by Subchapter B of Chapter 1 and the amount shown as the tax by the taxpayers upon their return. Section 294, a part of Supplement M of Chapter 1, is entitled 'Additions to the Tax in Case of Nonpayment,' and the provisions of (d) are that certain amounts 'shall be added to the tax.' Those additions are a part of the whole tax imposed by Chapter 1 and must be considered along with the so-called overassessment of the Subchapter B tax for that year to find out whether the commissioner actually determined a deficiency for the year within the definition of Section 271 or whether he determined an overassessment. **E. C. Newsom,** 22 T.C. 225 (Dec. 20, 315), aff'd. per curiam 219 Fed. (2d) 444 (55-1 USTC 9253); **Union Telephone Company,** 41 B.T.A. 152 (Dec. 10,969); **Ely & Walker Dry Goods Co.** v. **United States,** 34 Fed. (2d) 429 (1 USTC 423), cert. denied 281 U.S. 755; **Schneider** v. **United States,** 119 Fed (2d) 215 (41-1 USTC 9389); **Herbert Eck,** 16 T.C. 511 (Dec. 18,146), aff'd. per curiam 202 Fed. (2d) 750 (53-1 USTC 9287), cert. denied 346 U. S. 822.

" 'The tax imposed by this chapter,' Chapter 1, is here the sum of that portion of the tax imposed by Subchapter B and the additions thereto imposed under Section 294 (d) of Supplement M, both of which provisions are a part of Chapter 1. The tax thus imposed under Chapter 1 for the year 1949, in the opinion of the commissioner, exceeds the tax shown as the tax by the taxpayers upon their return; a deficiency would result under the definition of Section 271; the statutory notice sent by the commissioner shows that he has determined a deficiency in the net amount of $106.05; and

> the Tax Court thus has jurisdiction over the entire income tax liability of the petitioners for that year."

The next case to consider this question was **Marbut** v. **Commissioner,** 28 T.C. —, No. 74, filed June 24, 1957. In this case the taxpayer had consented to an extension of the statute of limitations on the assessment and collection of tax. After the expiration of the statute of limitations but within the period prescribed by the extension agreement, the commissioner sent a statutory notice asserting a deficiency arising only out of additions to the tax for the failure to file timely estimated tax returns and substantial underestimate of tax. In holding that these additions to the tax were a deficiency the Court said—

> "It is well established that the word 'tax' includes any applicable interest, penalty, or other addition, all of which are to be assessed and collected in the same manner as in the case of the principal amount of tax. **Helvering** v. **Mitches**, 303 U. S. 391 (1938) (38-1 USTC 9152); **Schneider** v. **United States,** (C. A. 6, 1941) 119 Fed. (2d) 215 (41-1 USTC 9389); **E. C. Newsom,** 22 T.C. 225 (Dec. 20, 315), affirmed per curiam (C. A. 5, 1955) 219 Fed. (2d) 444 (55-1 USTC 9253); **Charles E. Myers,** Sr., 28 T.C.—, No. 2 (Apr. 9, 1957) (Dec. 22, 323). The **Newsom** and **Myers** cases point out that Section 271 (a) defines a deficiency in terms of 'the tax imposed by this chapter,' Chapter 1. Section 294 is included in 'this chapter.' It follows, therefore, if a section 294 addition to the tax can by itself be a deficiency within the

meaning of Section 271 (a), it is a part of the tax for the purpose of assessment and collection."

The last court to consider this question was the United States District Court for the Southern District of Mississippi in the case of **Muse** v. **Enochs.**— Fed. 2d—58-2 USTC 9819 decided August 26, 1958. In that case the taxpayers filed their income tax return for the year 1956 and paid the tax therein. The commissioner, without a statutory notice, assessed an addition to the tax under Section 6654 for the substantial underestimate of estimated income tax. In sustaining the taxpayer the Court said—

> "It is quite clear that the plaintiffs must prevail. Section 6659 of the Internal Revenue Code of 1954 specifically states that all of the additions to tax, additional amounts and penalties provided by Chapter 68 of the Internal Revenue Code of 1954 shall be assessed, collected and paid in the same manner as taxes and that any reference in the Internal Revenue Code to 'tax' imposed shall be deemed also to refer to the additions to the tax, additional amounts and penalties provided by Chapter 68. Section 6654 is a part of Chapter 68 of the Internal Revenue Code of 1954.
>
> "Furthermore, in the Senate Committee Report to be found at page 4568, 1954 U. S. Code and Congressional Administrative News, the following reference is made to Section 6659:
>
> " 'This section is identical with that of the House Bill.
>
> " 'This section provides that the additions to the tax, additional amounts, and penalties

provided by Chapter 68 shall be assessed, collected, and paid in the same manner as taxes, except where otherwise specifically provided in another section of this title. This conforms to the rules under existing law. By virtue of this section, it is unnecessary in other parts of the title to specifically refer to these additions to the tax when providing rules as to the collection, assessment, etc., of the taxes. This section also makes clear that the procedures for the assessment of deficiencies in income, estate and gift taxes (including 90-day letters and appeal to the Tax Court), also apply in additions to those taxes.'

"Such statutory language is too clear for discussion. The contention of the defendant that the determinations of penalties or additions to tax for underestimation or underpayment of estimated tax are mere 'mathematical errors', appearing upon the return, so that under the provisions of Section 6213 (b) the defendant is relieved from the restrictions on assessment of tax contained in Section 6213 (a), is wholly untenable.

"See the cases of **Hackleman** v. **Granquist,** 147 Fed. Supp. 826 (DC, Ore., 1957) (57-1 USTC 9560); **Newsom** v. **Commissioner,** 22 TC 225 (CCH Dec. 20, 315), aff'd. 219 Fed. (2d) 444 (CA 5th, 1955) (55-1 USTC 9253); and **Davis** v. **Dudley,** 124 Fed. Supp. 426 (DC Pa., 1954) (54-2 USTC 9590), where the same point was involved, and in all of which cases the taxprayer prevailed."

The position of the appellant and the regulations

of the commissioner [18] are in clear derogation of Section 6659. With the exception of the **Erie Forge Co.** case, every court that has considered this question has rendered an opinion contrary to the position asserted by the appellant. [19] The **Erie Forge Co.** case stands by itself. The judge who wrote the opinion later relegated it to oblivion by the process of distinguishment and proclaimed it inapplicable under the 1954 Code. [20]

The argument of the appellant has three facets; first, that this is mere mathematical error. This position was asserted in oral argument below and in the **Muse** case which held that such an argument is untenable. It is submitted that the question of

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[18] Regulations: Section 301.6659-1 (Appendix, *infra*). The Regulations were published subsequent to the *Hackleman, Newsom* and *Davis* cases, but were published prior to the *Myers, Marbut* and *Muse* cases. To this extent the latter cases refused to follow the Regulations. Tax practitioners objected to the promulgation of these Regulations in present form. The Committee on Taxation of the Oregon State Bar Association sought to file a formal objection to these Regulations but was unable to do so without submitting the matter to the entire Bar Association for a vote which was not feasible. It is submitted that these Regulations are directly contradictory to Section 6659 and the decided cases.

[19] *Washburn* v. *Commissioner,* 7 B.T.A. 483; *Newsom* v. *Commissioner,* 22 T.C. 225 affirmed, per curiam, 219 F. 2d 444; *Davis* v. *Dudley* 124 F. Supp. 426; *Myers* v. *Commissioner,* 28 T.C. —. No. 2, filed April 9, 1957; *Marbut* v. *Commissioner,* 28 T.C. —, No. 74 filed June 24, 1957; *McAllister* v. *Dudley,* 148 F. Supp. (West Dist. Pa.); *Muse* v. *Enochs,* 58-2 USTC 9819, decided 8/26/58 (Miss.).

[20] *Davis* v. *Dudley,* 124 F. Supp. 426 (West Dist. Pa.).

whether or not the failure to file a timely return was due to reasonable cause and not due to wilful neglect is not the subject of mathematical formulae. [21]

Secondly, the appellant contends that the mere late filing of a return is a confession of guilt and is an admission that the failure was without reasonable cause and was due to wilful neglect; [22] that the amount so admitted shall be collected in the same manner as the **amount** of tax shown on the return. It is submitted that appellant knew when the return was due and that when she filed a return at a later date she knew it was late. But when she paid only the tax shown to be due thereon she expressly denied any liability for an addition to this tax due to her failure, without reasonable cause and due to wilful neglect, to file a timely return. She was not making a self return of such addition to the tax. It is further submitted that the language of Section 291, "same manner as the tax," does not refer to the **amount** of tax shown on the return but refers to the **type** of tax to which the addition applies as was held in the **McAllister** case (**supra**). The

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[21] Compare Section 6601 (f) (1) dealing with deficiency procedure in the case of interest which is purely mathematical and Section 6659 (b), dealing with additions to the tax involving human discretion.

[22] The appellant and the *Erie Forge* case argue that the addition to the tax is admitted as well as the amount of the tax shown on the return

manner of collecting additional income taxes is by deficiency procedure and not by arbitrary assessment. [23]

Thirdly, the appellant contends that the application of deficiency procedures to the additions to the tax will:

(a) "Seriously hamper the prompt collection of taxes." [24]

(b) "The purpose of the present statute imposing penalties would be largely defeated, and taxpayer would delay filing returns showing taxes admittedly due with comparative immunity if the commissioner can be forced to submit to delays incident to the ninety-day letters and deficiency procedures in order to collect delinquency penalties under the circumstances of the case under review." [25]

Such an argument is untenable. The great success of our system of taxation by self-assessment was predicted on the premise that the great majority of Americans pay the taxes they think are owing. If the taxpayer thinks he owes the additional tax, the commissioner may ask him, as in the case of other deficiencies, to sign a Form 870 which is a form consenting to the assessment and waiving the restrictions on the assessment and col-

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[23] Section 6213 (Appendix, *infra*)
[24] Appellant's brief, p. 28
[25] Apellant's brief, p. 29

lection of taxes under Section 6213. Congress realized that it is the desire of Americans to pay promptly the tax admittedly due and therefore prescribed a means by which the restrictions upon assessment and collection of a deficiency could be waived.

Futhermore, it is in such circumstances as the case under review where, had the appellant prevailed below, the appellee through the collection of a tax not determined to be owing would have lost several thousand dollars' worth of cattle and hay and ultimately her ranch. Congress in its infinite wisdom provided for a system of determining the correctness of a tax before requiring payment and in so providing said—

> "The right of appeal after payment of a tax was an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the returning of the tax after payment. He is entitled to an appeal and to determination of his liability prior to its payment." Ways and Means Committee of the 68th Congress, First Session, House of Representatives Report No. 179, pages 7 and 8.

Representative Green of Iowa in a discussion on the floor of the House of Representatives said—

> "In the revision of the law a special effort was made to give the taxpayer better opportunity to present his case when he thought the tax was being unjustly leveled against him or being levied in too great an amount. For this purpose a Board of Tax Appeals is created, to be appointed by the President and to hear the cases." Congressional Record, Vol. 65, page 2429.

Thus Congress sought to prevent the tyranny of arbitrary assessment and the wasting of assets sacrificed to pay a tax not determined to be owing.

CONCLUSION

The decision of the District Court is correct, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 271 (As amended by Sec. 14 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231). DEFINITION OF DEFICIENCY.

(a) **In General.** — As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

* * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) **Petition to Tax Court of the United States.** —If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday, or a legal holiday in the District of Columbia as the

ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 291. (As amended by Sec. 172) (f), Revenue Act of 1942, c. 619, 56 Stat. 798). FAILURE TO FILE RETURN.

(a) In case of any failure to make and file return

required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612 (d) (1).

(26 U.S.C. 1952 ed., Sec. 291.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) **Tax.**—Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Sec. 3653.)

Internal Revenue Code of 1954:

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) **In General.**—For purposes of this title in the case of income, estate, and gift taxes, imposed by subtitles A and B, the term "deficiency" means the amount by which the tax imposed by subtitles A or B exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6211.)

SEC. 6212. NOTICE OF DEFICIENCY.

(a) **In General.**—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) **Time for Filing Petition and Restriction on Assessment.**— Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after

the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(26 U.S.C. 1952 ed., Supp. II, Sec. 6213.)

SEC. 6651. FAILURE TO FILE TAX RETURN.

(a) **Addition to the Tax.**—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes,

and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6651.)

SEC. 6659. APPLICABLE RULES.

(a) **Additions Treated as Tax.**—Except as otherwise provided in this title—

(1) The additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

(b) **Additions to Tax for Failure to File Return or Pay Tax.**—Any addition under section 6651 or

section 6653 to a tax imposed by another subtitle of this title shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax (including the provisions of subchapter B of chapter 63, relating to deficiency procedures for income, estate, and gift taxes).

(26 U.S.C. 1952 ed., Supp. II, Sec. 6659.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) **Tax.**—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7421.)

Treasury Regulations on Additions to the Tax, Additional Amounts, and Assessable Penalties (1954 Code):

Section 301.6659-1 **Applicable Rules.**—(a) **Additions treated as tax.**—Except as otherwise provided in the Code, any reference in the Code to "tax" shall be deemed also to be a reference to any addition to the tax, additional amount, or penalty imposed by chapter 68 with respect to such tax. Such additions to the tax, additional amounts, and penalties shall become payable upon notice and de-

mand therefor and shall be assessed, collected, and paid in the same manner as taxes.

(b) **Additions to tax for failure to file return or pay tax.**—Any addition under section 6651 or section 6653 to a tax shall be considered a part of such tax for the purpose of the assessment and collection of such tax. For applicability of deficiency procedures to additions to the tax , see paragraph (c) of this section.

(c) **Deficiency procedures.**— (1) **Additions to the tax for failure to file tax return.**—Subchapter B or chapter 63 (deficiency procedures) applies to the additions to the income, estate, and gift taxes imposed by section 6651 for failure to file a tax return to the same extent that it applies to such taxes. Accordingly, if there is a deficiency (as defined in section 6211) in the tax (apart from the addition to the tax) where a return has not been timely filed, deficiency procedures apply to the addition to the tax under section 6651. If there is no deficiency in the tax where a return has not been timely filed, the addition to the tax under section 6651 may be assessed and collected without deficiency procedures. The provisions of this subparagraph may be illustrated by the following examples:

Example (1). A filed his income tax return for the calendar year 1955 on May 15, 1956, not having

been granted an extension of time for such filing. His failure to file on time was not due to reasonable cause. The return showed a liability of $1,000 and it was determined that A is liable under section 6651 for an addition to such tax of $50 (5 percent a month for 1 month). The provisions of subchapter B of chapter 63 (deficiency procedures) do not apply to the assessment and collection of the addition to the tax since such provisions are not applicable to the tax with respect to which such addition was asserted, there being no statutory deficiency for purposes of section 6211.

Example (2). Assume the same facts as in example (1) and assume further that a deficiency of $500 in tax and a further $25 addition to the tax under section 6651 is asserted against A for the calendar year 1955. Thus, the total addition to the tax under section 6651 is $75. Since the provisions of subchapter B of chapter 63 are applicable to the $500 deficiency, they likewise apply to the $25 addition to the tax asserted with respect to such deficiency (but not to the $50 addition to the tax under example (1)).

(2) **Additions to the tax for negligence or fraud.**— Subchapter B of chapter 63 (deficency procedures) applies to all additions to the income, estate, and gift taxes imposed by section 6653 (a) and (b) for negligence and fraud.

(3) **Additions to tax for failure to pay estimated income taxes.**— (i) **Return filed by taxpayer.**— The addition to the tax for underpayment of estimated income tax imposed by section 6654 (relating to failure by individuals to pay estimated income tax) or section 6655 (relating to failure by corporations to pay estimated income tax) is determined by reference to the tax shown on the return if a return is filed. Therefore, such addition may be assessed and collected without regard to the provisions of subchapter B of chapter 63 (deficiency procedures) if a return is filed since such provisions are not applicable to the assessment of the tax shown on the return. Further, since the additions to the tax imposed by section 6654 or 6655 are determined soley by reference to the amount of tax shown on the return if a return is filed, the assertion of a deficiency with respect to any tax not shown on such return will not make the provisions of subchapter B of chapter 63 (deficiency procedures) apply to the assessment and collection of any additions to the tax under section 6654 or 6655.

(ii) **No return filed by taxpayer.**—If the taxpayer has not filed a return and his entire income tax liability is asserted as a deficiency to which the provisions of subchapter B of chapter 63 apply, such provisions likewise will apply to any addition to such tax imposed by section 6654 or 6655.